No. 90-410

Supreme Court, U.S.
FILED
OCT 10 1990
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1990

BRUCE COHN, individually, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a California corporation,

Petitioners,

v.

DAVID KATZ, individually, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

DAVID B. BIRENBAUM, ESQ.
Counsel of Record
for Petitioners

SIDNEY A. LUSCUTOFF, ESQ.
JETHRO S. BUSCH, ESQ.
BIRENBAUM, LUSCUTOFF
& LENDORMY
1 Post Street, 21st Floor
San Francisco, California
94104-5200
(415) 989-7500
Counsel for Petitioners

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

No. 90-410

In The

Supreme Court of the United States

October Term, 1990

BRUCE COHN, individually, BRUCE COHN MANAGEMENT, INC., a California corporation, and DANJOE CORPORATION, a California corporation,

Petitioners,

v.

DAVID KATZ, individually, KATZ-COHN PRODUCTIONS, INC., an Arizona corporation, and KATZ-COHN MANAGEMENT, INC., an Arizona corporation,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI[1]

[1] In accordance with Supreme Court Rule 29.1, Petitioners hereby submit the following list of parties:

(Continued on following page)

I. THE RESPONDENTS' BRIEF *CONFIRMS* THAT THEY WERE ALLOWED TO RECOVER ON AN *UN*PLEADED AND *UN*LITIGATED THEORY OF RECOVERY. THE BRIEF ALSO CONFIRMS THE NEED TO PROVIDE THE LOWER COURTS WITH EFFECTIVE GUIDANCE AS TO THE DUE PROCESS IMPLICATIONS OF PRETRIAL STATEMENTS AND JUDICIAL ADMISSIONS.

A. Oh. *Those* Judicial Admissions . . . .

To their credit, Respondents forthrightly **admit** (on page 3 of their Opposition Brief) that:

> As the record shows, this case involved only one joint venture, the terms of which were first seriously discussed beginning in October 1982. *Respondents contended that the joint venture was formed then and later modified in December 1982 but not thereafter.* [Emphasis added.]

The Respondents further admit (on page 3 of their Opposition Brief) that:

> Neither side contended that the agreement was finalized at the February 4 meeting. *Respondents*

(Footnote 1 continued from previous page)

Petitioners (defendants below) are Bruce Cohn, Bruce Cohn Management, Inc. (a California corporation) and Danjoe Corporation (a California corporation).

Respondents (plaintiffs below) are David Katz, Katz-Cohn Productions, Inc. (an Arizona corporation), and Katz-Cohn Management, Inc. (an Arizona corporation).

Martin Cohn was a defendant and cross-complainant in the District Court, but is no longer a party to this action.

Petitioners are unaware of any parent or subsidiary corporations of the corporate parties set forth above.

> *argued that it had been finalized earlier,* and petitioners argued that it was never finalized. [Emphasis added.]

Thus, the Respondents freely *concede* that the Petitioners had absolutely no notice from the pleadings, pre-trial statement or any other source that the Respondents were suing on a *1983* contract.

Having made these concessions, the Respondents offer *not one, single citation* of authority to refute the abundant authorities cited in the Petition, and offer no explanation as to why this Court's *Oscanyan v. W.R. Arms Co.* [103 U.S. 261, 263-266 (1881)] decision may be disregarded.

Instead, the Respondents appear to be arguing that a jury may make any decision it wants, regardless of whether the defendant has been given fair notice of the claims being made against him, and regardless of whether the defendant has been given a meaningful opportunity to intelligently respond to those charges at trial.

Since **both** the trial court *and* the Ninth Circuit seem to have accepted this novel and frightening contention, the Petitioners respectfully submit that there is a clear and urgent need for this Court to instruct the lower courts as to the Due Process implications of disregarding pre-trial statements and judicial admissions.

B. Grounds for Granting Petition Amply Demonstrated

For reasons best known to themselves, the Respondents have characterized the Petitioners' Petition as "frivolous."

Clearly, nothing could be further from the truth.

The actions of both the Ninth Circuit and the District Court clearly conflict with this Court's decisions in *Oscanyan v. W.R. Arms Co.* [103 U.S. 261, 263-266 (1881)] and *Gasoline Prods. Co. v. Champion Ref. Co.* [283 U.S 494, 500 (1931)]. Thus, ample grounds for granting the Petition exist under Supreme Court Rule 10.1(c).

As is set forth both above, and in the Petition itself, the Ninth Circuit's decision:

> . . . . has so far departed from the accepted and usual exercise of judicial proceedings, or sanctioned such a departure by a lower court as to call for an exercise of this Court's power of supervision.
>
> Supreme Court Rule 10.1(a).

CONCLUSION

Unless defendants receive fair and effective notice of the charges made against them, the Due Process Clause becomes a dead letter, and we may as well return to trial by combat – the results could be no less arbitrary, and the process would probably be more expeditious.

Petitioners respectfully submit that the Petition should be granted, both to maintain the integrity of the

judicial process, and to provide the lower courts with necessary guidance on the Due Process issues raised by the Petition.

Respectfully Submitted,

DAVID B. BIRENBAUM
Counsel of Record for Petitioners

SIDNEY A. LUSCUTOFF, ESQ.
JETHRO S. BUSCH, ESQ.
BIRENBAUM, LUSCUTOFF & LENDORMY
One Post Street, 21st Floor
San Francisco, CA 94104-5200
(415) 989-7500
Counsel for Petitioners